

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY WESLEY,

Defendant-Appellant.

UNPUBLISHED

April 13, 2004

No. 243626

Wayne Circuit Court

LC No. 00-011010-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN R. WILEY,

Defendant-Appellant.

No. 243627

Wayne Circuit Court

LC No. 00-011010-01

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendants Larry Wesley and Calvin R. Wiley were tried together before the same jury. Defendant Wesley, Docket No. 243626, was convicted of second-degree murder, MCL 750.317, and sentenced to twelve to twenty years in prison. Defendant Wiley, Docket No. 243627, was also convicted of second-degree murder, and was sentenced to fifteen to twenty-five years in prison. Both defendants appeal as of right, and their cases have been consolidated on appeal. We affirm.

Docket No. 243626

Defendant Wesley argues on appeal that he was denied a fair trial because of prosecutorial misconduct. Prosecutorial issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor is afforded great latitude in closing argument, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and is not required to use the “blandest possible terms” to state his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). This Court considers alleged prosecutorial

misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Here, defense counsel did not object to any of the challenged comments. Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; in the absence of an objection, this Court will only review the defendant's claim for plain error. *Schutte, supra*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Any possible prejudicial effect from the prosecutor's remarks in this case could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We find no plain error. *Schutte, supra*.

Wesley also argues that the trial court's failure to use CJI2d 16.9 to instruct the jury on voluntary manslaughter violated his right to a fair trial. We disagree. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997).

The trial court instructed the jury on the lesser included offense of voluntary manslaughter, using CJI2d 16.8. The Use Notes to CJI2d 16.8 indicate that, where the defendant is charged with murder, the voluntary manslaughter instruction in CJI2d 16.9 should be used instead. Defendant did not object to the instructions given at trial. After the jury began deliberations, it asked for clarification regarding the voluntary manslaughter instruction. The trial court acknowledged at that time that CJI2d 16.9 was the more appropriate instruction and stated that it would give the instruction if both parties consented. The prosecutor asked that CJI2d 16.9 be given, but defense counsel objected, arguing that Wesley would be prejudiced if the instruction was changed. Since Wesley approved the original jury instruction, and specifically objected to the use of CJI2d 16.9, he cannot now claim that the trial court erred in failing to give the instruction. Allowing Wesley to attack the jury instruction now would allow him to harbor error as an appellate parachute. *People v Bart*, 220 Mich App 1, 15; 558 NW2d 449 (1996).

Docket No. 243627

Defendant Wiley argues on appeal that the trial court's admission of pre-autopsy color photos of the victim deprived him of his right to due process. We disagree.

"The decision to admit or exclude photographs is within the sole discretion of the trial court." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). Photographs need not be excluded merely because a witness can testify about the information contained in the photographs; photographs may also be admissible if they corroborate a witness' testimony. *Id.* The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Mills, supra*.

Here, the photographs were relevant to consideration of the medical examiner's testimony that the victim's bruises were very recent, and Wiley's suggestion that the victim's injuries were from a prior incident. Furthermore, malice is an element of second-degree murder,

People v Goecke, 457 Mich 442, 464; 579 NW2d 868 1998), and the photographs were relevant to the question whether the injuries here were severe enough to permit such an inference. The fact that there was testimony regarding the victim's injuries and that the photographs were somewhat gruesome is not enough to preclude the evidence, and we are not convinced that the probative value of the photographs was substantially outweighed by unfair prejudice. *Mills, supra*. The trial court did not abuse its discretion in admitting the photographs.

Finally, Wiley argues that he was denied a fair trial because of prosecutorial misconduct. We disagree for the same reasons stated above in Docket No. 243626, *supra*.

The convictions of both defendants are affirmed.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio